



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2004

Mr. Swanson W. Angle
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2004-5962

Dear Mr. Angle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205512.

Dallas Area Rapid Transit ("DART") received a request for information relating to a contract modification. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that much of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

[w]ithout limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body; except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). In this instance, the submitted documents include a completed report made of, or, or by a governmental body. DART must release the report under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The submitted documents also include information contained in a contract relating to the receipt or expenditure of public or other funds by a governmental body. DART must release that information under section 552.022(a)(3) unless it is expressly confidential under other law. The submitted documents also include working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body. DART must release that information, on completion of the estimate, under section 552.022(a)(5) unless the information is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold any of the submitted information that is subject to section 552.022 under section 552.103. We have marked that information.

Next, we address your claim under section 552.103 with regard to the remaining information. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990) Id.*

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982).* Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See Open Records Decision No. 588 (1991).*

You state that the DART procurement regulations and the DART construction contracts provide for an administrative dispute process. You assert that the administrative process for contract disputes provides for full discovery and for the opportunity to be heard and to offer evidence. You state that a permanent record is made of the proceeding, and that factual questions are resolved, with the decision considered final and conclusive as to questions of fact. Based on your representations and the documentation that you have submitted, we conclude that you have demonstrated that DART's administrative proceeding for contract disputes is conducted in a quasi-judicial forum, that litigation was pending when DART received this request for information, and that the rest of the submitted information is related to the pending litigation.

We note, however, that the opposing party in the litigation already has seen or had access to much of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, to the extent that the opposing party to the litigation already has seen or had access to the remaining information, through discovery or otherwise, there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, DART may not withhold any of the remaining information that the opposing party has seen or to which the opposing party has had access under section 552.103. We also note that the remaining information includes a resolution of the executive committee of the Dallas Area Rapid Transit Board. If this resolution was adopted in a public meeting of the board, then DART may not withhold the resolution under section 552.103. *See* Open Records Decision No. 221 (1979) (statutory predecessor to Gov't Code § 552.103 not applicable to official records of governmental body's public proceedings). With these exceptions, DART may withhold the remaining information under section 552.103. The applicability of section 552.103 ends when the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) DART may not withhold the information that is subject to section 552.022 under section 552.103; (2) DART may withhold the remaining information under section 552.103, except for (a) the information that the opposing party in the pending litigation has seen or to which the opposing party has already had access; and (b) the resolution of the executive committee, if it was adopted at a public meeting. The submitted information that is not excepted from disclosure under section 552.103 must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

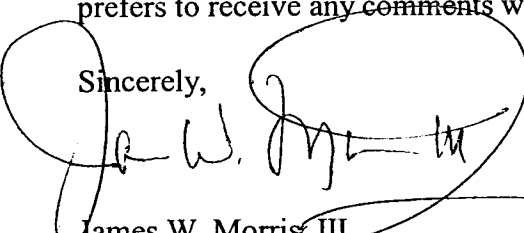
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 205512

Enc: Submitted documents

c: Mr. Mike Piscitelli
Vezina, Lawrence & Piscitelli, P.A.
350 East Las Olas Boulevard, Suite 1130
Fort Lauderdale, Florida 33301
(w/o enclosures)